RECORD AND BRIEFS

Supreme Court, U.S.
FILED
FEB 6 - 2017
OFFICE OF THE CLERK

No. 16-341

IN THE

Supreme Court of the United States

TC HEARTLAND LLC,

Petitioner,

v.

KRAFT FOOD BRANDS GROUP LLC,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF REALTORS IN SUPPORT OF PETITIONER

JOEL B. ARD
Counsel of Record
FOSTER PEPPER PLLC
1111 3d Avenue
Seattle, WA 98101
(206) 701-9243
Joel.Ard@Foster.com

Counsel for National Association of Realtors

February 6, 2017

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. INTRODUCTION	4
II. The Sources And Results Of The Patent Faction	7
A. Patent Litigation In The Eastern District of Texas	7
B. The Eastern District of Texas After Alice	11
III. CONGRESS SEEKS GEOGRAPHICALLY DIVIDED POWER OVER PATENT ADJUDICATION	12
A. The Patent Pilot Program Sought To Involve Many Judges	13
B. The PTAB, Congress's Delegated Administrative Adjudicators, Has Many Members	15
C. Congress Has Long Directed The Involvement Of Many Trial Courts And Many Appellate Panels	16
D. Grants Of Trial Court Discretion Presuppose Many Judges' Involvement	20

TABLE OF CONTENTS—Continued

Page

IV. THE PATENT FACTION EVADES CONSTITUTIONAL LIMITS ON PATENT POWER 21

CONCLUSION 26

TABLE OF AUTHORITIES

CASES — Page(s)

Alice Corp. Pty. Ltd. v. CLS Bank Int'l.,
__ U.S. __, 134 S. Ct. 2347 (2014) ... 8, 11, 21, 24

Ass'n for Molecular Pathology v. Myriad Genetics, Inc.,
__ U.S. __, 133 S. Ct. 2107 (2013) 24

eBay Inc. v. MercExchange,
547 U.S. 388 (2006 20

District of Columbia v. Heller,
554 U.S. 570 (2008) 22

Gomez v. United States,
490 U.S. 858 (1989) 25

Gottschalk v. Benson,
409 U.S. 63 (1972) 11, 24, 26

Halo Elecs., Inc. v. Pulse Elecs., Inc.,
__ U.S. __, 138 S. Ct. 1923 (2016) 20

Harper v. Virginia State Bd. of Elections,
383 U.S. 663 (1966) 23

Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,
530 U.S. 1 (2000) 5

Highmark Inc. v. Allcare Mgmt Sys.,
__ U.S. __, 134 S. Ct. 1774 (2014) 20

Lochner v. NewYork,
198 U.S. 45 (1905) 23

Mayo Collaborative Servs. v. Prometheus Labs., Inc.,
566 U.S. 66 (2012) 24, 26

TABLE OF AUTHORITIES—Continued

Page(s)

McCulloch v. Maryland,
17 U.S. (4 Wheat.) 316 (1819) 22

O'Reilly v. Morse,
56 U.S. 62 (1853) 21

Octane Fitness, LLC v. ICON Health & Fitness, Inc.,
__ U.S. __, 134 S. Ct. 1749 (2014) 20

Teva Pharm. USA v. Sandoz, Inc.,
135 S. Ct. 831 (2015) 2

United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.,
484 U.S. 365 (1988) 6

United States v. Krueger,
809 F.3d 1109 (10th Cir. 2015) 6, 12, 13

VE Holding Corp. v. Johnson Gas Appliance Co.,
917 F.2d 1574 (Fed. Cir. 1990) 7

CONSTITUTION

U.S. Const. art. I, § 8 22

U.S. Const. art. I, § 8, cl. 4 23

U.S. Const. art. I, § 8, cl. 8 ..... *passim*

U.S. Const. art. I, § 8, cl. 11 23

U.S. Const. art. I, § 8, cl. 18 23

U.S. Const. amend. II 22

TABLE OF AUTHORITIES—Continued

STATUTES — Page(s)

28 U.S.C. § 1391 ..... 3, 5, 25

28 U.S.C. § 1400 ..... *passim*

35 U.S.C. § 6 15

35 U.S.C. § 101 11

35 U.S.C. § 261 7

Immigration Act, ch. 376, 22 Stat. 214 (1882) 23

Patent Cases Pilot Program, Pub. L. No. 111-349 (Jan. 4, 2011) 13, 14, 15

Pub. L. 89-236, 79 Stat. 911 (1965) 23

Pub. L. No. 95-486, 92 Stat. 1629 (1978) 17

Pub. L. No. 96-452, 94 Stat. 1994 (1980) 17

Pub. L. No. 97-164, 96 Stat. 25 (1982) 18

Pub. L. 113-3, 127 Stat. 51 (2013) 23

Tex. Bus. Orgs. Code Ann. § 2.001 (West 2006) 7

RULES

Fed. R. Civ. P. 12(b)(6) 24

E.D. Tex. Civ. R. 26(a)-(d) (May 24, 2016) ... 8

COURT FILINGS

Brief for Petitioner, *TC Heartland, LLC d/b/a Heartland Food Prods. Grp. v. Kraft Foods Grp. Brands LLC*, No. 16-341 (U.S. Jan. 30, 2017) 5

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES Page(s)

110 Cong. Rec. H1413 (daily ed. Feb. 12, 2007) 14

111 Cong. Rec. H8539 (daily ed. Dec. 16, 2010) 14

Admin. Off. U.S. Courts, *U.S. Courts of Appeals Additional Authorized Judgeships*, *available at* http://www.uscourts.gov/sites/default/files/appealsauth_0.pdf (last visited Feb. 5, 2017) 19

Admin. Off. U.S. Courts, *U.S. District Courts Additional Authorized Judgeships* (2016), *available at* http://www.uscourts.gov/sites/default/files/districtauth_0.pdf 12, 18, 19

Admin. Off. U.S. Courts, *U.S. District Courts—Civil Cases Commended, by Nature of Suit and District, During the 12-Month Period Ending June 30, 2016* (June 30, 2016), *available at* http://www.uscourts.gov/sites/default/files/data_tables/stfj_c3_630.2016.pdf 18

Alan C. Marco et al., *The USPTO Historical Patent Data File: Two Centuries of Invention*, (U.S. Patent & Trademark Office, Working Paper No. 2015-125, June 2015), *available at* https://www.uspto.gov/sites/default/files/documents/USPTO_economic_WP_2015-01_ v2.pdf 9

TABLE OF AUTHORITIES—Continued

Page(s)

Brian J. Love & James C. Yoon, *Predictably Expensive: A Critical Look at Patent Litigation in the Eastern District of Texas*, 20 Stan. Tech. L. Rev. 1 (2016) ..... *passim*

Docket Navigator, *Docket Navigator Analytics*, http://home.docketnavigator.com/overview/analytics (last visited Feb. 3, 2017) 8, 12, 20

Docket Navigator, *Docket Navigator Research Database*, http://home.docketnavigator.com/overview/docket-navigator (last visited Feb. 3, 2017) 8-9

Fed. Judicial Ctr., *History of the Federal Judiciary: The U.S. Courts of Appeals and the Federal Judiciary*, http://www.fjc.gov/history/home.nsf/page/courts_of_appeals.html (last visited Jan. 30, 2017) ... 17

Fed. Judicial Ctr., *History of the Federal Judiciary: The U.S. District Courts and the Federal Judiciary*, http://www.fjc.gov/history/home.nsf/page/courts_district.html (last visited Jan. 30, 2017) 17

Fed. Trade Comm'n, *Patent Assertion Entity Activity: An FTC Study* (Oct. 2016), *available at* https://www.ftc.gov/system/files/documents/reports/patent-assertion-entity-activity-ftc-study/p131203_patent_assertion_entity_activity_an_ftc_study_0.pdf 8, 10

TABLE OF AUTHORITIES—Continued

Page(s)

George Washington, *Farewell Address*, in *WRITINGS* (Literary Classics of the United States, Inc., 1997) 4, 5, 25

Matthew Sag, *IP Litigation in District Courts: 1994-2014*, 101 Iowa L. Rev. 1065 (2015) 18

Richard P. Stanley, *Enumerative Combinatorics Volume 1* (2d ed. 2011), *available at* http://math.mit.edu/~rstan/ec/ec1.pdf 16

S. Rep. No. 97-275 (1981), *as reprinted in* 1982 U.S.C.C.A.N. 11 18

Sample Discovery Order for Patent Cases Assigned to Judge Rodney Gilstrap and Judge Roy Payne, *available at* http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=22243 (last visited Feb. 5, 2017) 8

The Federalist No. 10 (James Madison) 6, 7, 12, 13

U.S. Patent and Trademark Office, *Organizational Structure and Administration of the Patent Trial and Appeal Board*, *available at* https://www.uspto.gov/sites/default/files/documents/Organizational%20Structure%20of%20the%20Board%20May%2012%202015.pdf (last visited Feb. 5, 2017) 15

INTEREST OF AMICUS CURIAE[1]

Amicus Curiae ("Amicus"), the National Association of REALTORS® ("NAR"), "The Voice for Real Estate," is America's largest trade association, representing more than 1 million members, including NAR's Institutes, Societies and Councils, involved in all aspects of the residential and commercial real estate industries. Our membership is composed of residential and commercial brokers, salespeople, property managers, appraisers, counselors and others engaged in all aspects of the real estate industry. Members belong to one or more of some 1,100 local associations and 54 state and territory associations of REALTORS®. They are pledged to a strict Code of Ethics and Standards of Practice. Working for America's property owners, NAR provides a facility for professional development, research and exchange of information among its members and to the public and government for the purpose of preserving the free enterprise system and the right to own real property.

The real estate industry's ability to serve the public increasingly relies on advances in technology. NAR supports the advancement of technology, and to that end, the orderly and rational development and protection of intellectual property rights, and full access to a broad range of courts nationwide to enforce those rights. Nevertheless, NAR's members have been subjected to patent infringement suits in a peculiar

---

[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, amicus states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amicus, its members, or its counsel made a monetary contribution for its preparation or submission.

concentration of only a few courts in a few districts. NAR believes that Congress intended for patent laws to be interpreted and developed with the benefit of the wisdom of many district court judges nationwide, and that the patent venue statute 28 U.S.C. § 1400(b) was intended to be, and should be, so construed.

SUMMARY OF ARGUMENT

This case involves the proper interpretation of statutory venue in patent cases. The Federal Circuit has construed patent venue so broadly that it allows any plaintiff to sue in the venue of its choice. This has created a patent faction of non-practicing entity plaintiffs that concentrates a substantial majority of patent cases in plaintiff-friendly venues. The concentration results when the faction files cases in the few district courts where the current construction of the venue statutes, local rules, caseload, and docket management practices allow them to avoid early merits adjudication. The Federal Circuit's construction has contributed to a system in which patent law develops in a silo, without the benefit of the divergent viewpoints from a multitude of district court judges. In practical effect, defendants accused by the faction of infringing even a plainly unenforceable patent often must choose between settling the case or cost-prohibitive litigation.

The concentration runs counter to Congress's desire to widely distribute adjudication of nationally-significant patent rights and diverts patents from the Constitution's direction that patent laws "promote the Progress of Science and useful Arts." This Court's evaluation of the text of 28 U.S.C. §§ 1391 and 1400 should also consider the systemic effect of those statutes on the administration of the Patent Act, including whether the patent system as legislated by Congress, interpreted by this Court, and implemented by the various United States District Courts, effects its constitutional purpose. For these reasons, this Court should reverse the decision of the Federal Circuit and construe the patent venue statute as advocated by Petitioner.

ARGUMENT

I. INTRODUCTION

President Washington warned against the destructive tendency of any faction, not merely partisan divisions:

> [A]ll combinations and Associations . . . with the real design to direct, control, counteract, or awe the regular deliberation and action of the Constituted authorities . . . serve to organize faction, . . . to put in the place of the delegated will of the Nation, the will of a party; often a small but artful and enterprising minority of the Community; and, according to the alternate triumphs of different parties, to make the public administration the Mirror of the ill concerted and incongruous projects of faction, rather than the organ of consistent and wholesome plans digested by common councils and modified by mutual interests.[2]

President Washington named the source of contemporary maladministration of American patent law: Faction. As this brief explains, a faction comprised largely of patent plaintiffs who assert a class of patents covering internet, e-commerce, and electronic communication but who themselves manufacture nothing, and often as not employ no one, has concentrated the adjudication of a vital subset of the nation's

---

[2] George Washington, *Farewell Address*, in *WRITINGS* 962, 968 (Literary Classics of the United States, Inc., 1997) (hereinafter, "*Washington's Farewell Address*").

patents in the hands of "a small but artful and enterprising minority of the Community."[3] That concentration impermissibly undermines the structure of the Patent Act by hindering Congress's repeated expression of its desire to involve many different courts across the nation in adjudicating patent grants. The resultant faction diverts an entire class of patents to purely private gain and away from their Constitutional purpose: "To promote the Progress of Science and useful Arts."[4]

As other briefs explain, the plain language of the two venue statutes in this case requires this Court to reverse the lower court's ruling. This brief does not repeat their arguments, but does agree with their conclusions.[5] 28 U.S.C. § 1400(b) specifically governs venue in patent cases rather than the general venue statute (28 U.S.C. § 1391(c)), because § 1391(a) expressly excludes application of § 1391 where other venue provisions govern. Although the patent specific venue provision (§ 1400(b)) does not itself define "resides," this Court has historically interpreted "resides" in § 1400 as the patent defendant's state of incorporation. This alone requires reversal of the court below.[6]

Amicus submits this brief because even if this Court finds some ambiguity in the statutes' plain language,

---

[3] *Id.*

[4] U.S. Const. art. I, § 8, cl. 8.

[5] Brief for Petitioner at 21-42, *TC Heartland, LLC d/b/a Heartland Food Prods. Grp. v. Kraft Foods Grp. Brands LLC*, No. 16-341 (U.S. Jan. 30, 2017).

[6] *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("[W]hen the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms.") (internal quotation marks omitted).

this Court must nevertheless adopt the construction that "produces a substantive effect that is compatible with the rest of the law."[7] Such a construction will avoid the factious concentration that is inconsistent with how "Congress has repeatedly displayed a preference for geographically divided power in its treatment of the federal judiciary since the Judiciary Act of 1789."[8] This Court must reject a construction that injects an unconstitutional trespass on the purposive preamble of our Constitution's Patent Clause, especially as to a vital subset of patents addressing e-commerce, the internet, and modes of electronic communication.

The legally correct, narrow construction of the statute's venue provisions compels plaintiffs to disperse patent filings around the country. This would cure the current faction in patent litigation venue, as foreseen by Madison in Federalist No. 10:

> The greater number of citizens . . . which may be brought within the compass of . . . government . . . is [the] circumstance principally which renders factious combinations less to be dreaded . . . Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover

---

[7] *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988).

[8] *United States v. Krueger*, 809 F.3d 1109, 1125 (10th Cir. 2015) (Gorsuch, J., concurring).

their own strength, and to act in unison with one each other.[9]

II. The Sources And Results Of The Patent Faction

The question presented in this case addresses *only* the proper statutory construction of *only one* of many constituent elements that together enable the patent faction: the federal venue statutes. Neither this case, nor any other, could reasonably question most elements that combine to give life to the patent faction. The faction uses a combination of individually permissible laws and rules to focus its attention primarily on a single district court, the Eastern District of Texas, a venue where the patent faction finds that it can avoid judicial review of patentable subject matter, review required by this Court's precedents.

A. Patent Litigation In The Eastern District of Texas

The patent faction works with the combined effect of various laws and rules, including the current venue rule,[10] state long-arm statutes,[11] alienability of patents,[12] state laws allowing corporations that exist for the sole purpose asserting patents,[13] disparity in discovery costs between patent assertion entities and practicing

---

[9] The Federalist No. 10 (James Madison).

[10] *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1575 (Fed. Cir. 1990).

[11] *Id.* at 1583.

[12] 35 U.S.C. § 261 ("[P]atents shall have the attributes of personal property.").

[13] *See, e.g.*, Tex. Bus. Orgs. Code Ann. § 2.001 (West 2006).

defendants,[14] local patent rules and practices,[15] and disparities in courts' consideration and grant of dispositive motions challenging patentable subject matter.[16] Focusing primarily on the one federal venue where it finds a uniquely favorable combination of these elements, the patent faction has created an outcome Congress did not intend and could not have foreseen. The faction's practice, particularly in the Eastern District of Texas, and particularly as it concerns e-commerce and internet patents, raises concerns about enforcement of the constitutional limits on patent power repeatedly identified by this Court.

The statistical anomaly of the Eastern District of Texas' patent docket has been described by numerous other amici. It is striking. Plaintiffs file nearly 40% of all patent cases, and 60% of cases asserting high-tech patents, in just that one district.[17] A study by

---

[14] Fed. Trade Comm'n, *Patent Assertion Entity Activity: An FTC Study* 7 n.12 (Oct. 2016), *available at* https://www.ftc.gov/system/files/documents/reports/patent-assertion-entity-activity-ftc-study/p131203_patent_assertion_entity_activity_an_ftc_study_0.pdf.

[15] *See* E.D. Tex. Civ. R. 26(a)-(d) (May 24, 2016) (requiring broad discovery responses despite pending dispositive motions); *Sample Discovery Order for Patent Cases Assigned to Judge Rodney Gilstrap and Judge Roy Payne*, *available at* http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=22243. (last visited Feb. 5, 2017).

[16] Brian J. Love & James C. Yoon, *Predictably Expensive: A Critical Look at Patent Litigation in the Eastern District of Texas*, 20 Stan. Tech. L. Rev. 1, 30-34 (2016) (describing reluctance of E.D. Texas to hear and grant *Alice* motions) (Hereinafter "Love").

[17] *See Docket Navigator Analytics*, Docket Navigator, http://home.docketnavigator.com/overview/analytics (last visited Feb. 3, 2017). Docket Navigator is an SaaS provider that allows users to search documents filed in patent infringement suits and generate related analytics. *See Docket Navigator Research*

Professors Brian Love and James Yoon found that since 2014, "more than 90% of patent suits in East Texas were filed by PAEs enforcing high tech patents."[18] A small group of plaintiffs initiates this high volume of patent filings, relying on local patent case assignment rules which ensure the cases come before a few judges.[19]

This concentration has real, adverse consequences. For example, Professors Love and Yoon found East Texas judges are "*disproportionately unlikely* to stay cases pending post-grant challenges, to require that patentees litigate individual cases against individual defendants, to grant early motions to dismiss on patentable subject matter grounds, and to award attorney's fees to prevailing parties."[20] The standing case schedule for patent cases in East Texas pairs early and broad discovery deadlines with relatively late (and unlikely to be granted) actions on motions to transfer, motions to dismiss, motions for summary judgment, and claim construction rulings. For all these categories of milestone rulings in patent cases,

---

Database, Docket Navigator, http://home.docketnavigator.com/overview/docket-navigator (last visited Feb. 3, 2017). All patent litigation statistics in this brief resulted from searching for suits filed between January 1, 2015 and December 31, 2015. "High tech" patents as the terms is used herein are those U.S. Patent Classifications grouped by NBER Technology Categories for Computers & Communications and Electrical & Electronic, with all related subgroupings. *See* Alan C. Marco et al., *The USPTO Historical Patent Data File: Two Centuries of Invention*, 25 (U.S. Patent & Trademark Office, Working Paper No. 2015-125, June 2015), *available at* https://www.uspto.gov/sites/default/files/documents/USPTO_economic_WP_2015-01_v2.pdf.

[18] Love, *supra* n. 16 at 12.

[19] *Id.* at 6, 25.

[20] *Id.* at 26.

this one district is less likely than other districts to rule in favor of defendants, and more likely to be reversed on appeal.[21]

Tellingly, a recent study by the Federal Trade Commission concluded that 77% of settlements resulting from a litigation settlement with a patent assertion entity cost defendants less than the estimated cost of defending a patent lawsuit *merely through the end of discovery*—essentially ensuring that an overwhelming majority of settlements in these cases fell below a nuisance cost of litigation.[22] In the Eastern District of Texas, milestone rulings that might resolve a patent case in a cost-efficient manner (*e.g.*, dismissal motion or claim construction ruling) often do not occur until well after a defendant completes the long, one-sided, and expensive discovery period. Using this local practice, the faction often compels an economically rational defendant to settle for a nuisance value below the cost of discovery, which the FTC estimates falls anywhere between $300,000 and $2.5 million.[23] As a result, a defendant sued in the Eastern District of Texas likely incurs significant expense in discovery before ever reaching the merits. This often makes settlement at less than the cost of the unbridled discovery and resolution delays, as allowed in this one district, the economically rational choice.

---

[21] *Id.* at 16–19.

[22] *Supra* n. 14, at 10.

[23] *Id.*

B. The Eastern District of Texas After *Alice*

This Court recently addressed the question of patentable subject matter in computer-implemented inventions in *Alice Corp. Pty. Ltd. v. CLS Bank Int'l.*[24] Early dispositive motions challenging the subject matter of claims under 35 U.S.C. § 101, in light of *Alice*, have revolutionized early stage litigation of patents claiming computer implemented inventions. But the revolution did not reach, nor deter, the patent faction in the Eastern District of Texas. Since June 2014, 180 patent cases outside the Eastern District have faced patentable subject matter challenges invoking *Alice*. In over half those cases, courts found patent claims invalid for lack of patentable subject matter. By sharp contrast, in the Eastern District of Texas, where plaintiffs filed over 40% of all patent cases and over 60% of cases asserting high-tech patents, the court has ruled on only thirty-nine *Alice* challenges and granted only fourteen.[25] In short, a patent that wrongly deprives the public of "the basic tools of scientific and technological work"[26] can live on in the Eastern District of Texas, diverting that patent, and others like it, from the constitutional purpose of the Patent Clause: "To Promote the progress of Science."[27] Correct construction of the venue provisions answers not only the question presented in this case but also stands as the only effective judicial remedy to the current faction in patent litigation venue. As discussed below, correct construction of

---

[24] __ U.S. __, 134 S. Ct. 2347 (2014).

[25] Love, *supra* n. 16.

[26] *Gottschalk v. Benson*, 409 U.S. 63, 67 (1972).

[27] U.S. Const. art I, § 8, cl. 8.

the venue provisions does more than enforce their written text: It compels plaintiffs to disperse patent suits among all the nation's district courts and reinvigorates enforcement of constitutional limits on patent power that protect the public and protect future innovation.

III. CONGRESS SEEKS GEOGRAPHICALLY DIVIDED POWER OVER PATENT ADJUDICATION

As explained earlier, the patent faction's use of the Eastern District of Texas' unique combination of rules has effectively concentrated over 40% of patent litigation in the hands of only two judges.[28] In sharp contrast to this outcome, "Congress has repeatedly displayed a preference for geographically divided power in its treatment of the federal judiciary since the Judiciary Act of 1789 . . ."[29] Indeed, Congress has demonstrated its preference for geographic dispersal of patent trials no less than any other federal questions. An opposite result, arising in part from the lower court's construction of the venue provisions of Title 28, is incompatible with the balance of Title 35. Accordingly, this Court should reject it.

Madison's insights in Federalist No. 10 find expression in today's 94 federal district courts and nearly 700 authorized district judgeships.[30] By seeking "fit characters" from the entire Republic, Congress has

---

[28] *See supra* n. 17.

[29] *Krueger*, 809 F.3d at 1125.

[30] *U.S. District Courts Additional Authorized Judgeships*, Admin. Off. U.S. Courts (2016), *available at* http://www.uscourts.gov/sites/default/files/districtauth_0.pdf. Here and in all similar statistics, only the authorized judgeships were counted, excluding temporary or senior status judges.

created "a greater probability of a fit choice" in those judges.[31] By distributing the judicial districts and judgeships geographically across the country, Congress can "[e]xtend the sphere, and take in a greater variety of parties and interests."[32] Modern court administration further advances this principle by distributing intermediate appellate review among three-member panels of multi-member courts, vastly increasing the possible variety of interlocutions between trial judge and appellate panel. Even where Congress has sought specialization in patent adjudication, whether at the administrative, trial court, or appellate level, it has always created structures that, if properly executed, distribute decisions among numerous participants, not a statistically insignificant few. In light of this repeated Congressional preference, expressed in both the Patent Act and in the structure of the lower federal courts, this Court should consider not only the statutory text, but also the actual effect of the lower court's construction of the venue statutes, because "it would be more than a little ironic for an Article III court to deny effect to Congress's attentive work in this area."[33]

A. The Patent Pilot Program Sought To Involve Many Judges

Recent congressional action supporting district court's work in patent cases demonstrates Congress's aversion to the concentration of patent litigation found today. Congress created the ten year Patent Pilot Program ("PPP") "to encourage enhancement of expertise

---

[31] The Federalist No. 10 (James Madison).

[32] *Id.*

[33] *Krueger*, 809 F.3d at 1125.

in patent cases among district judges,"[34] and included measures intended to limit or prevent forum shopping despite a certain level of adjudicative concentration within participating district courts. Congress required the PPP to include "not less than 6 United States district courts, in at least 3 different judicial circuits."[35] Among those participating districts, it required at least three districts with ten or more authorized judges and three or more judges participating in the program, and at least three districts with fewer than ten district judges but at least two participating judges.[36]

Congress required a minimum number of district courts as well as a minimum number of trial judges within each participating district court "to ensure that the selection of a certain court does not mean the selection of a certain judge."[37] Therefore, even as the pilot program increases the expertise of judges who opt into the program, "it also ensures that the selection of a certain district court is not outcome-determinative, and thus it does deter forum shopping."[38] A "core intent of this pilot [was] to steer patent cases to judges that have the desire and aptitude to hear patent cases, while preserving random assignment as much as possible."[39] Here, too, Congress plainly considered that more, rather than fewer judges should evaluate national patent rights, and that those judges should

---

[34] Patent Cases Pilot Program, Pub. L. No. 111-349 (Jan. 4, 2011).

[35] Pub. L. No. 111-349 § 1(b).

[36] *Id.*

[37] 110 Cong. Rec. H1413 (daily ed. Feb. 12, 2007).

[38] *Id.*

[39] 111 Cong. Rec. H8539 (daily ed. Dec. 16, 2010) (statement of Congressman Issa).

come from geographically dispersed district courts of varying size. This result stands in marked contrast to the consequences of the construction of venue rules at issue in this case. Proper construction of the venue clauses will result in actual litigation practice that gives full effect to the Congressional intent of the PPP.

B. The PTAB, Congress's Delegated Administrative Adjudicators, Has Many Members

When Congress authorized an extremely specialized patent adjudicatory body within the United States Patent Office, it ensured participation by many administrative adjudicators. The Patent Trial and Appeal Board ("PTAB"), created by the America Invents Act ("AIA), consists of Administrative Patent Judges ("APJs") who sit on three member panels that adjudicate contested AIA trials.[40] As of summer 2016, the PTAB consisted of 271 APJs, of whom approximately 7% focus on administrative duties. The PTAB divides the remaining 253 APJs into 12 sections according to broad technical focus, for assignment to trial panels.[41] Thus, Congress's creation of even this most specialized group of patent adjudicators follows its regular practice of involving many separate voices in patent adjudication.

Each of the foregoing statutory mandates expressly or impliedly extends the sphere of patent adjudication. If this Court entertains any doubt as to the proper

---

[40] 35 U.S.C. § 6.

[41] U.S. Patent and Trademark Office, *Organizational Structure and Administration of the Patent Trial and Appeal Board*, 2, *available at* https://www.uspto.gov/sites/default/files/documents/Organizational%20Structure%20of%20the%20Board%20May%2012%202015.pdf (last visited Feb. 5, 2017).

construction of the two venue provisions, it should adopt a construction that avoids a result that contradicts and undermines other substantive portions of the Patent Act, through which Congress has repeatedly expressed its intention for broad district court involvement in patent adjudication.

C. Congress Has Long Directed The Involvement Of Many Trial Courts And Many Appellate Panels

Throughout the history of the operative patent venue statute (§ 1400(b)), and even after the creation of a special purpose patent appellate court, Congress has sought the involvement of a broad variety of trial judges and review panels in adjudicating the scope of patent grants. Just prior to the creation of the Federal Circuit in 1982, patent litigants appealed to one of the regional courts of appeal. Thus, in 1981, a suit might begin before any one of 512 district court judges, with appeal to a panel of the regional circuit. This meant a patent suit would be heard and then reviewed by one of 200,990 possible combinations of trial court and appellate panel:[42]

---

[42] All charts include only the number of authorized judgeships, and exclude temporary judges, judges on senior status, or reductions due to vacancies. Further, the number of potential three member panels on any court of n members is determined by the following formula: $n(n-1)(n-2)/6$. *See, e.g.*, Richard P. Stanley, *Enumerative Combinatorics Volume 1* 23 (2d ed. 2011), *available at* http://math.mit.edu/~rstan/ec/ec1.pdf.

Circuit Court	1981 Circuit Judges[43]	Potential Panels	1981 District Judges[44]	Potential Pairings[45]
District of Columbia	11	165	15	2,475
First	4	4	23	92
Second	11	165	50	8,250
Third	10	120	48	5,760
Fourth	10	120	44	5,280
Fifth	14	364	57	20,748
Sixth	11	165	51	8,415
Seventh	9	84	36	3,024
Eighth	9	84	35	2,940
Ninth	23	1,771	74	131,054
Tenth	8	56	27	1,512
Eleventh	12	220	52	11,440
Total				**200,990**

---

[43] *History of the Federal Judiciary; The U.S. Courts of Appeals and the Federal Judiciary*, Fed. Judicial Ctr. http://www.fjc.gov/history/home.nsf/page/courts_of_appeals.html (last visited Jan. 30, 2017). The "Select a Circuit" dropdown list gives the number of authorized judges after each legislative change in authorized seats. Pub. L. No. 95-486, 92 Stat. 1629 (1978) increased the federal judiciary prior to 1981. Pub. L. No. 96-452, 94 Stat. 1994 (1980) reorganized the Fifth Circuit into the Fifth Circuit and the Eleventh Circuit.

[44] *History of the Federal Judiciary: The U.S. District Courts and the Federal Judiciary*, Fed. Judicial Ctr. http://www.fjc.gov/history/home.nsf/page/courts_district.html (last visited Jan. 30, 2017). The "Select by State" dropdown list gives the number of authorized seats per state and per district. Territorial court judges were not counted.

[45] The potential pairings equal the number of district court judges multiplied by the number of potential panels.

In light of Congress's concern that variations in appellate treatment of patent rights led to forum shopping, it created the 12-member United States Court of Appeals for the Federal Circuit in 1982.[46] Thus, if patent plaintiffs had subsequently distributed suits among the nation's authorized District Court judges as evenly as any other private civil litigation,[47] Congress would still have created a system with 146,740 possible combinations of trial court and appellate panel, arising from cases heard before 667 trial judges and appealed to 220 possible appellate panels from the 12-member Federal Circuit.

Of course, had Congress desired instead the contemporary concentration of patent litigation in a few district courts within three different circuits,[48] there would have been no need to create the Federal Circuit,

---

[46] *See* S. Rep. No. 97-275, 5 (1981), *as reprinted in* 1982 U.S.C.C.A.N. 11, 15; Pub. L. No. 97-164, 96 Stat. 25 (1982).

[47] For non-intellectual property private civil cases, a district's percentage of cases roughly correlates to its percentage of authorized judges. *Compare U.S. District Courts Additional Authorized Judgeships*, *supra* n. 30, with *Table C-3: U.S. District Courts—Civil Cases Commended, by Nature of Suit and District, During the 12-Month Period Ending June 30, 2016*, Admin. Off. U.S. Courts (June 30, 2016), *available at* http://www.uscourts.gov/sites/default/files/data_tables/stfj_c3_630.2016.pdf. Private civil cases are Contract, Real Property, Motor Vehicle Personal Injury, Other Personal Injury, Other Tort Action, Civil Rights, and Labor Suits from Table C-3; *see also* Matthew Sag, *IP Litigation in District Courts: 1994-2014*, 101 Iowa L. Rev. 1065, 1087-88, 1095-99 (2015) (finding geographic distribution of copyright cases to be "somewhat chaotic" or "literally all over the place" compared to patent cases).

[48] Love, *supra* n. 16, at 8 (finding 59.4% of all patent filings between January 2014 and June 2016 occurred in the Eastern District of Texas, District of Delaware, Central District of California, and Northern District of California).

thereby still ensuring many possible variations of interlocution between trial and appellate judges. In such a counterfactual example, most litigants would appeal, for instance, from the District of Delaware to the Third Circuit; from the Eastern District of Texas to the Fifth; and from Northern and Central California to the Ninth. Even that state of affairs would have reflected an extended sphere of over 156,000 potential trial and appellate pairings:

Circuit Court	Circuit Judges[49]	Potential Panels	District Judges[50]	Potential Pairings
Third	14	364	4	1,456
Fifth	17	680	7[51]	4,760
Ninth	29	3,654	41	149,814
Total				**156,030**

In the current state of affairs, fewer than 10% of all district court judges adjudicate over 60% of patent suits. Each suit is appealed to a small, specialized patent appellate panel. This results in a fraction of the number of possible trial deliberation and appellate review pairings for patent law than any system actually designed by Congress. The districts of Delaware,

---

[49] *U.S. Courts of Appeals Additional Authorized Judgeships*, Admin. Off. U.S. Courts, *available at* http://www.uscourts.gov/sites/default/files/appealsauth_0.pdf (last visited Feb. 5, 2017).

[50] *U.S. District Courts Additional Authorized Judgeships*, *supra* n. 30. These numbers only include the number of authorized judgeships for the District of Delaware, the Eastern District of Texas, and the Northern and Central Districts of California.

[51] This number exaggerates the potential pairings, because the Eastern District of Texas does not randomly assign civil cases to judges. Due to assignment rules, nearly all cases are assigned to one judge in each division. Love, *supra* n. 16.

Eastern Texas, and Northern and Central California, with 52 authorized judges,[52] hear over 60% of all patent suits.[53] Litigants appeal those judgments to 220 potential Federal Circuit panels, leaving only 11,440 possible pairings of trial court and subsequent appellate panel: only 7% of the number of relevant pairings legally available under the broad structure actually mandated by Congress.

D. Grants Of Trial Court Discretion Presuppose Many Judges' Involvement

As further evidence of Congressional opposition to concentration of patent trials, this Court has consistently concluded that Congress gave broad district court discretion in many aspects of patent cases. This Court has reversed Federal Circuit decisions that narrow the sources of patent law jurisprudence, finding congressional grants of district court discretion in numerous sections of the Patent Act and various Federal Rules of Evidence and Civil Procedure. This includes discretion to grant or deny injunctions,[54] discretion to award or deny attorneys' fees,[55] deference to district court fact-finding in claim construction,[56] and discretion to award or deny enhanced damages.[57]

---

[52] Again, disregarding case assignment rules that constrain rather than extend the sphere.

[53] *See supra* n. 17.

[54] *eBay Inc. v. MercExchange*, 547 U.S. 388 (2006).

[55] *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, __ U.S. __, 134 S. Ct. 1749 (2014); *Highmark Inc. v. Allcare Mgmt Sys.*, __ U.S. __, 134 S. Ct. 1774 (2014).

[56] *Teva Pharm. USA v. Sandoz, Inc.*, 135 S. Ct. 831 (2015).

[57] *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, __ U.S. __, 138 S. Ct. 1923 (2016).

This Court should consider that today, adjudication of over 40% of these discretionary questions comes from the pens of two trial judges instead of 220 potential Federal Circuit panels. In contrast to today's actual practice, this Court's decisions reinforce the conclusion that the proper construction of the venue statutes must result in broader venue as a matter of fact, not merely of theory. Correct construction results in over 660 adjudicators in practice, far more than if Congress had chosen to vest the Federal Circuit with decisional authority over these questions. Reflecting the natural structure of the entire congressional implementation of patent adjudication, Congress's repeated grants of district court discretion strongly suggest its intent to implement patent venue that involves more, not fewer, judges in hearing patent suits.

IV. THE PATENT FACTION EVADES CONSTITUTIONAL LIMITS ON PATENT POWER

For over 150 years, the Court has shown that constitutional limits on the scope of patentable subject matter affect the resulting scope of future innovation. In other words, limitations on patentable subject matter help enforce the constitutional mandate that patents must promote the progress of science.[58] The patent faction's focus on the Eastern District of Texas works to exclude high-tech patents – those reasonably subject to review under *Alice* – from judicial review of constitutional limits on patentable subject matter, review that has become routine in other districts.

The Constitution authorizes Congress to "secur[e] for limited Times to . . . Inventors the exclusive

---

[58] *See, e.g.*, *O'Reilly v. Morse*, 56 U.S. 62, 112 (1853) (disallowing claim scope that covered undisclosed means on the grounds that, *i.a.*, it would deter future innovation).

Right to their . . . Discoveries."[59] Like few enumerated powers in Article I, Section 8, the Constitution grants the patent power only as the means to effect a desired end: "To promote the Progress of Science and Useful Arts."[60] As this Court recognized in construing the grammatically-similar Second Amendment, "[l]ogic demands that there be a link between the stated purpose and the command. . . Therefore . . . we will return to the prefatory clause to ensure that our reading of the operative clause is consistent with the announced purpose."[61]

Here, where the Court construes two statutes that affect nationwide implementation of Title 35, and thus Congress's chosen means to effect the purpose of the Patent Clause, it should ensure that its reading of the statutes "is consistent with [the] announced purpose."[62] The Constitution rarely requires the Court to consider a constitutional purpose when construing a statute. As the Court recognized in *Heller*, however, where a clause contains a purposive preamble, the Court cannot ignore it, but must give "a fair construction of the whole instrument."[63] Thus, the Court's review of congressional implementation of the Patent

---

[59] U.S. Const. art. I, § 8, cl. 8.

[60] *Id.*

[61] *District of Columbia v. Heller*, 554 U.S. 570, 578 (2008); *see also id.* at 641–43 (Stevens, J., dissenting) (judging the Constitutionality of a challenged statute by first construing the prefatory, purposive clause of the Second Amendment); *id.* at 682–83 (Breyer, J. dissenting) (construing the Second Amendment's preamble because "[t]he Amendment must be interpreted and applied with that end in view") (internal citation omitted).

[62] *Heller*, 554 U.S. at 578.

[63] *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819).

Clause differs from its review of statutes implementing enumerated congressional powers with no purposive limitation. Congress may borrow money for any purpose, not merely to satisfy debts already incurred.[64] Its regulation of commerce need not "enact Mr. Herbert Spencer's Social Statics."[65] Congress's "uniform Rule of naturalization"[66] may promote family reunification,[67] or exclude those "likely to become a public charge."[68] When Congress declares war, the cause need not be just.[69] But when Congress authorizes a patent grant, the Constitution requires the grant and the "Laws . . . necessary and proper for carrying into Execution the [patent] power"[70] to "promote the Progress of Science and useful Arts."[71]

To ensure the Patent Act remains consistent with this express constitutional purpose, this Court has always excluded from it certain categories of subject matter. For this reason, "[p]henomena of nature, though just discovered, mental processes, and abstract intellectual concepts are not patentable, as they are the

---

[64] *See, e.g.*, 127 Stat. 51, Pub. L. 113-3 (2013).

[65] *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 669 (1966) (citing and vindicating Justice Holmes' dissent in *Lochner v. New York*, 198 U.S. 45 (1905)) ("We agree, of course, with Mr. Justice Holmes that the Due Process Clause of the Fourteenth Amendment 'does not enact Mr. Herbert Spencer's Social Statics.'").

[66] U.S. Const. art. I, § 8, cl. 4.

[67] *See, e.g.*, 79 Stat. 911, Pub. L. 89-236 (1965).

[68] Immigration Act, ch. 376, 22 Stat. 214 (1882).

[69] U.S. Const. art. I, § 8, cl. 11.

[70] U.S. Const. art. I, § 8, cl. 18.

[71] U.S. Const. art. I, § 8, cl. 8.

basic tools of scientific and technological work."[72] Recently reiterating this ban, the Court noted that "monopolization of those tools through the grant of a patent might tend to impede innovation more than it would tend to promote it."[73] The Court excludes from patentable subject matter "the basic tools of scientific and technological work," because "without this exception, there would be considerable danger that the grant of patents would tie up the use of such tools and thereby *inhibit future innovation premised upon them* . . . This would be at odds with the very point of patents, which exist to promote creation."[74]

In light of these concerns, this Court revisited the question of patentable subject matter in computer-implemented inventions in *Alice*. Since the *Alice* decision in June 2014, district courts routinely implement its two-part test to enforce the constitutionally-purposive subject matter exclusion, often as early as motions to dismiss under Fed. R. Civ. P. 12(b)(6). As described above,[75] that review occurs far less often in the Eastern District of Texas, despite that plaintiffs assert in that court a far higher percentage of patents whose subject matter reasonably leaves them open to *Alice* challenges.

The lower court's construction of the venue statutes has enabled the patent faction to protect the subject

---

[72] *Gottschalk*, 409 U.S. at 67 (1972).

[73] *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 71 (2012).

[74] *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, __ U.S. __, 133 S. Ct. 2107, 2116 (2013) (emphasis added, internal citations and alterations omitted).

[75] *See supra* n. 24–25 and accompanying text.

matter of a class of internet, electronic communication, and e-commerce patents from judicial review. Because that subject matter review implements the constitutional purpose of the Patent Clause, if the Court finds any ambiguity in the text, it should adopt the construction that eliminates this potential infirmity and reinforces its many earlier decisions on the scope of patentable subject matter.[76] Here, the Petitioner's construction eliminates rather than engenders a nascent constitutional issue under the Patent Clause. Restoring Congress's stated venue preference will restore the Patent Act's proper purpose: to "Promote the progress of Science and Useful Arts."

CONCLUSION

Reaffirming 28 U.S.C. § 1400(b) as the sole congressional grant of patent venue will restore Congress's stated venue preference ***and*** the congressionally-recognized, constitutionally-mandated, Court-enforced public purpose of the Patent Act. It will divest from the faction the administration of an overwhelming fraction of certain patent litigation. And restoring Congress' expressed constraints on legally available venue in any individual patent suit will compel plaintiffs to broaden their election of venue, resulting in greater numbers of courts, judges, and jurors adjudicating patents. The text of 28 U.S.C. §§ 1391 and 1400 compels this change to available venue in patent cases. But, if the Court entertains any doubt, it should again consider Washington's Farewell Address:

---

[76] *Gomez v. United States*, 490 U.S. 858, 864 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question.").

> In all the changes to which you may be invited, remember that time and habit are at least as necessary to fix the true character of Governments, as of other human institutions; that experience is the surest standard, by which to test the real tendency of the existing Constitution of a country . . .

The sure standard of experience over the past two decades have tested the tendency of existing structures for adjudicating the nation's patents. They demonstrate that making nationwide venue available to plaintiffs results in concentrated venue in practice, allowing a factior to capture and privatize many of "the basic tools of scientific and technological work."[77] Contrary to the Constitution and the Patent Act, "monopolization of those tools through the grant of a patent . . . impede[s] innovation more than . . . promote it."[78] Only by properly construing the venue provisions of Title 28 to limit plaintiffs' choice of venue in patent suits can this Court restore Congress's intent for broad judicial involvement in patent adjudication, a constitutional limit on faction.

Respectfully submitted,

JOEL B. ARD
Counsel of Record
FOSTER PEPPER PLLC
1111 3d Avenue
Seattle, WA 98101
(206) 701-9243
Joel.Ard@Foster.com

Counsel for National Association of Realtors

February 6, 2017

---

[77] *Gottschalk*, 409 U.S. at 67 (1972).

[78] *Mayo*, 566 U.S. at 71.